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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930—No. 555

GEORGIA PUBLIC SERVICE COMMISSION, JAMES A. PERRY, ALBERT J. WOODRUFF, ET AL,
Appellants

vs.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSSION, ET AL,
Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF ON BEHALF OF ATLANTIC COAST LINE RAILROAD COMPANY, LOUISVILLE & NASHVILLE RAILROAD COMPANY, ATLANTA & WEST POINT RAILROAD COMPANY, SEABOARD AIR LINE RAILWAY COMPANY, THE LESSEES OF THE GEORGIA RAILROAD, THE NASHVILLE, CHATTANOOGA & ST. LOUIS RAILWAY, CENTRAL OF GEORGIA RAILWAY COMPANY, ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY, AND SOUTHERN RAILWAY COMPANY, REPLYING TO BRIEF FILED BY THE GEORGIA PUBLIC SERVICE COMMISSION AND ALSO TO BRIEF FILED BY THE STATE HIGHWAY BOARD, AND OTHERS

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Attorneys for the Carriers Mentioned.

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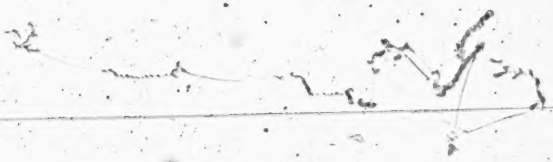

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PLEADINGS OF THE GEORGIA PUBLIC SERVICE COMMISSION BEFORE THE INTERSTATE COMMERCE COMMISSION

The Georgia Public Service Commission filed no pleadings before the Interstate Commission, except a petition for rehearing after the order of the Interstate Commission entered on December 9, 1929 (R. 118-133). It apparently relied upon its order of March 13, 1928, as a sufficient statement of its case to the Interstate Commission. At page 10 of the brief for the Georgia Commission it is stated that the Interstate Commission's report of January 21, 1927, did not prescribe rates generally throughout the Southeastern States. This order did prescribe rates interstate between points in the State of Georgia, and between points in the State of Georgia and points in other States in Southern territory, except Florida (R. 74). The Interstate Commission's second report showed that the rates which it prescribed in its first order were in effect interstate in all of the Southern territory except in Mississippi and the western parts of Tennessee and Kentucky, and were in effect intrastate in North Carolina and Alabama, and also in Tennessee and Kentucky except the western parts thereof (R. 91), and in the peninsula of Florida.

REPLY TO THE STATEMENT OF THE ESSENTIAL FINDINGS BY THE COMMISSION (Georgia Commission's Brief, p. 10)

The Interstate Commission did prescribe the maximum rates for interstate transportation in its order of January 21, 1927, and it did not prescribe minimum rates, but made the following statement in its report (R. 32):

> "While we shall not prescribe minimum rates, we shall prescribe a scale which takes fully into consideration the very low values of these commodities and all characteris-

tics, transportation or otherwise, which entitle them to relatively low rates. It will be a scale, in our opinion, from which the carriers ought not to depart. Departures could only have the result, ultimately, of forcing an unwarranted reduction in the general rate level on these commodities which would be burdensome to other traffic."

Of course, the Interstate Commission has jurisdiction over rates filed with it for interstate carriage, and those rates cannot be changed except after compliance with the requirements of the Interstate Commerce Act, Secs. 6 (3) and 15 (7), with the right in the Commission to reject changes which it may deem improper.

The statements in paragraphs (b), (c), (d), and (e), on page 11 of the Georgia Commission's brief, are correct. Those statements recognize that the Interstate Commission fixed a differential between single line hauls and joint line hauls and also provided for the application of the Fourth Section Order, which order is set out in Appendix No. 1 to our original brief, and certain arbitraries are allowed to so-called weak lines.

The statement in paragraph (f) of the Georgia Commission's brief (page 11) is correct. That statement means that the Interstate Commission found that the Georgia Commission's order of February 25, 1925, did not bring about a situation unjustly discriminatory against interstate commerce *on February* 25, 1925; but the Interstate Commission in its order of January 21, 1927, changed those rates. The Georgia rates as prescribed by its order of February 25, 1925, did discriminate against the interstate commerce rates thus fixed by the Interstate Commission. The Interstate Commission, as we have pointed out (R. 59), relied upon the Georgia Commission to make the changes in its rate structure which would relieve the discrimination brought about by the Interstate Commission's order of January 21, 1927. The Georgia Commission refused to do that, and out

of that grew the proceeding which resulted in the Commission's order of December 9, 1929 (R. 88).

Paragraph (g) states that the Commission in its order of December 9, 1929, found in very general terms that "the state rates in Georgia were in violation of Sec. 13," etc. This statement overlooks the finding of the Commission as to transportation, interstate and intrastate, to many State destinations, which points the Commission stated to be representative; also the evidence and findings covering points of origin within and without the State of Georgia and the many points of destination within the State; also the finding of agreement of the parties as to uniformity of conditions; also the findings as to values of the commodities, the keenness of competition, and the effect of slight differences in the transportation charges on the markets; also the findings as to the value of those commodities, their percentage of the total tonnage of the carriers and their percentage of the gross freight revenue; also the gross revenue per ton-mile on these commodities and that these were very low.

The statements in paragraphs (h) and (i) are simply references to the orders of December 9, 1929, claiming that the Commission specified no element except distance in the finding. This latter statement is incorrect, for the Commission did consider values, competition between commodities, competition between markets, competition between carriers, and the making of the Fourth Section Order and the adjustment incident thereto, together with the provision for the so-called weak lines, the nature of the commodities and other things. Paragraph (i) makes the point that the minimum basis is vague, indefinite and uncertain.

We submit that this statement of the essential findings of the Commission shows that the final points relied upon for attributing error to the Interstate Commission's order are:

(a) That the Commission prescribed joint line differentials;

(b) And a Fourth Section Order, set out in the Appendix to our original brief;

(c) That allowances were made to certain named lines, which are called short or weak lines;

(d) That no element, except distance, was considered in making the findings;

(e) That the basis for ascertaining the minimum basis of rates is indefinite and uncertain.

Each one of these points is controlled by the facts found by the Commission. In our original brief we have undertaken to show that no one of them is well taken.

We submit that this analysis, made on behalf of the Georgia Commission, of the findings of the Interstate Commission reflects the fact that this case was submitted to the Commission on the basis of competition between the Interstate Commission's method of removing discrimination and the Georgia Commission's method of removing it. The Georgia Commission did not deny the existence of discrimination, but claimed that the discrimination was brought about by the Interstate Commission's order rather than by its order. This fits into the theory of the order of the Georgia Commission of March 13, 1928 (R. 79).

REPLY TO ALLEGED "DEFICIENCIES IN RECORD BEFORE COMMISSION" (Georgia Commission's Brief, p. 13)

(a) (b) The first claim of deficiency is that the second hearing was limited to questions of undue prejudice and unjust preference and did not involve the reasonableness of the rates. We have replied to this in our original brief at page 41. This claim is based upon the fact that the original case was reopened

after the finding of January 21, 1927, for the sole purpose of ascertaining whether or not the Georgia rates of March 13, 1928, discriminated against the rates found reasonable by the Interstate Commission in its order of January 21, 1927. The Commission found against this point and so did the lower court. The rates had been ascertained by the Interstate Commission to be reasonable after a long investigation and a full hearing. No specific facts were pleaded or alleged to show any change since such finding.

Furthermore, at Record 615-616, copied at pages 30-31 of Georgia Highway Board's brief, it appears that the objections to the Commission's procedure were too general and indefinite, and do not in fact go to the point now raised. There were two objections. The first was that the issues now presented to the Commission as defined by the order, and as defined by the complaint, and as defined by the opening statement of the examiner, are not the same issues that were presented at that time, in those proceedings. The second was "that the testimony then given throws no real light on the conditions now obtaining and which will obtain for the future, * * * that conditions have materially changed since February, 1926 * * *, and much of the matter then in evidence was immaterial to any issue now before the Commission * * *."

Manifestly the first objection is of no force. The issue before the Commission in the second hearing was based upon the issues and finding in the first. In no circumstances could the record in the first hearing be irrelevant to the second hearing.

The second objection, besides being an argumentative statement, is incorrect. The evidence in the first hearing, of course, threw "real light" on the second.

> "A general objection is insufficient if the offered evidence is admissible for any purpose in the case; or, as

sometimes stated, such an objection is insufficient unless the evidence is wholly inadmissible for any purpose or in any aspect of the case."

9 Encyc. of Evidence, 62.

(c) This alleged deficiency is that there was no evidence offered or received to carry the burden of proof imposed by Section 15 (7) of the Act. The answer to this is that there was an immense amount of evidence offered on the subject and received by the Commission, considered, and the findings were made establishing rates after a full hearing. The Commission had prescribed as reasonable the interstate rates then in use in Georgia and those rates were then in effect. They thereby became a measure of reasonableness for the intrastate rates, it being conceded and found that the conditions of transportation were uniform. Furthermore there was much evidence on the comparison of the two systems of rates and findings of unlawful discrimination against the interstate rates. Discrimination to the extent of unlawfulness is unreasonable. Besides Section 15 (7) of the Act does not apply to situations of the kind here presented. We presume that the Georgia Commission intends that this point (c) shall be the same as points (a) and (b) under this subdivision of its brief. At any rate, neither the facts nor the findings sustain the point.

(d) This point is based upon the allegation on behalf of the Georgia Commission that there was no evidence in the record to show that transportation over joint line routes is more difficult or expensive than over single line routes for corresponding distances.

We think this point is made by the Georgia Commission in inadvertence.

The witness Doss testified (R. 346):

"The expense of handling this traffic over two or more lines is greater than the expense of a one-line haul. The Georgia Commission's proposed single line scale is, we think, too low, when the entire revenue accrues to the line performing the single line scale. But when we get beyond 100 miles, they allow no addition when the service has to be performed by two or more lines, although the expense is greater than for the single line service."

The latter part of this statement refers to the Georgia Commission's order of February 25, 1925 (R. 200), which did allow joint line differentials up to one hundred miles.

Mr. Doss then offered his Exhibit 52, showing in cents per ton for representative distances the amounts by which the joint line scale exceeded the single line scale on Classes 6 and D and on various commodities under the carriers' proposed scales and under the mileage scales which have since 1921 been prescribed by the Georgia Public Service Commission (R. 347). He also introduced a number of extracts from cases in the Interstate Commerce Commission allowing joint line differentials. These excerpts include those from Pennsylvania Sand and Gravel Producers Association vs. B. & O. Railroad Co., 104 I.C.C. 717, which was decided on December 22, 1925, fixing differentials on sand and gravel from shipping points in Western Pennsylvania to various interstate destinations; American Sand & Gravel Co. vs. C. & N. W. Ry. Co., 88 I.C.C. 1; Duquesne Slag Products Co. vs. Pennsylvania R. R. Co., 92 I.C.C. 554; Empire Cotton Oil Co. vs. Maxton, Alma & Southbound R. R. Co., 69 I.C.C. 729, 732; this concerned cotton seed; Continental Sugar Co. vs. New York Central Railroad, 91 I.C.C. 683, which concerned sugar beets; Southern Veneer Ass'n vs. A. C. L. R. R., 62 I.C.C. 673, which concerned certain kinds of logs.

In Southern Class Rate Investigation, 113 I.C.C. 200, at 205, the Commission recognized the propriety of making compensation for the added expense of joint line hauls over single line hauls.

In the light of this record it would seem that the argument should not be made that there was no evidence to support the differentials between the single lines and the joint lines.

(e) This alleged deficiency is based upon the theory that the record contains no evidence of transportation conditions, respecting the intrastate transportation of these materials in Georgia. It is difficult to understand this point in the light of the great volume of evidence that there is on the subject. There were a great many exhibits of comparisons of rates throughout the territory; evidence of adoption of the rates intrastate in North Carolina, Alabama, Kentucky and Tennessee (except the Mississippi Valley part of the last two states) (R. 629). The Georgia Commission admitted the uniformity of conditions in its brief before the Commission (R. 110); its order of March 13, 1928, is based on the existence of uniform conditions (R. 76, 78-79). At pages 626-627 of the record the witness Doss testified as to uniformity of conditions in the territory and the need for uniform rates (R. 506, 627). The witness Burke likewise gave evidence to the same effect (R. 682). The Commission found this uniform condition in its first report and adhered to it in the second (R. 78). This uniformity of condition in the territory was agreed upon by the parties to this cause, as we have pointed out in our original brief. (See R. 256 and 259—Question 6 and the answer).

CONSIDERATION OF SUMMARY OF ARGUMENT OF GEORGIA COMMISSION (Brief, pp. 19-24)

At page 20 the brief states:

> "In the present case the whole history of the action and attitude of the Georgia Commission has been in the direction of building up the revenues of these interstate carriers on these materials, *advancing cut-throat competitive rates* which various carriers have maintained, one competing

against the other, and to put the rate schedules on a fairly harmonious general basis. The order of the Georgia Commission fixing the maximum rates on these materials within Georgia, entered March 13, 1928, and against which the Commission's order is directed, was in complete harmony in principle with repeated decisions of the Interstate Commerce Commission, in the treatment of rates for so-called joint line hauls as distinguished from single line movements." (Italics added.)

We contend that this statement shows that the Georgia Commission was submitting its rate basis as one not only for statewide use but as one for the building up of the revenues of the interstate carriers, and that its statewide order was necessary because of the "cut-throat competitive rates which various carriers had maintained, one competing against another," and that it was the intent of the Georgia Commission to put the rate schedules on a "fairly harmonious basis." The rate schedules referred to are construed to be the interstate schedules and the intrastate schedules.

We contend that in the latter part of the quotation the Georgia Commission contends that its last order of March 13, 1928, is better than the Interstate Commission's order because the latter applied joint line differentials. Each of these statements emphasizes the need of uniformity of rates and shows that the carriers were engaged in cut-throat competition. Of course, that means that the rates which the carriers were making were so low that they required raising because of the revenue of the carriers. "Cut-throat" competition can mean only that kind of competition which was forcing the carriage of these commodities at less than compensatory rates.

The statement above quoted from the Georgia Commission's brief should be taken in connection with the findings of the Interstate Commission, pointed out at pages 26-30 and 60-63 of

our original brief, as to the quantity of these commodities carried, the low revenue therefrom, the large percentage of the tonnage of the carriers made by these commodities, and the low corresponding percentage of revenue of the carriers derived from this carriage, and the low ton mileage thereon, and when thus considered in connection with these findings it shows that the Georgia Commission itself recognized that there was a need of change in the rates on these commodities intrastate in Georgia and of harmony therewith with the Interstate rates, not only because of the discrimination against persons, places, etc., but also because of the effect on the revenue of the carriers, which was being worked by the rate situation which the two Commissions were undertaking to cure and which brought about a competition called by the Georgia Commission "cut-throat."

We contend that the Georgia Commission's brief and its order of March 13, 1928, recognized the need of uniformity; that there was improper competition between the railroads as to these commodities; that the Georgia Commission claimed, as did the Interstate Commission, that this should be removed. The Georgia Commission's claim is that the Interstate Commission's basis is wrong because of the differentials allowed by the latter Commission for joint hauls and because of the Fourth Section Order. The Georgia Commission had itself allowed joint line differentials on the same commodities up to 100 miles in its order of February 25, 1925. It now authorizes these differentials on a number of commodities, to-wit:

Asphalt	Brick
Creosote	Sewer pipe
Road oil	Drain tile
Pitch and tar	Wall coping
Canned goods	Peanuts
Cotton ties	Wood-waste, resinous
Potatoes	Tile-roofing, ridge or border
Beans—velvet, soy, soja or soya	Limestone—white stone or marble
Cottonseed	

See 56th Report of Georgia Public Service Commission, pages 186-212.

Relief of the kind called Fourth Section Relief is provided by the Georgia Commission in its order of March 13, 1928. See Sections 5 and 8 (R. 81-82).

THE GEORGIA COMMISSION'S METHOD OF ASCERTAINING MILEAGE WAS VERY MUCH THE SAME AS THAT PRESCRIBED BY THE INTERSTATE COMMISSION

The witness Price stated (R. 765) that the tariffs contain a rule defining how the Georgia scale will be applied. That is, what mileage may govern. This is Agent Glenn's Tariff I.C.C. A-529, Freight Tariff No. 33. The rule applicable is Note 2, page 16-A, which is as follows:

> "Where there are two or more available routes between any two points, the lowest rates applicable via any route between said points will be applicable via all available routes between said points, except as provided below:
>
> "Exceptions: Rates applicable between junction points and local stations on any railroad serving such junction points, and between local stations on any railroad will apply only via such railroad direct, whether such rates are made by use of mileage scales for single line or joint haul application, except:"

The exceptions referred to were certain specific cases.

The difference between the Georgia Commission's rule and the Interstate Commission's rule appears to be that the Interstate Commission's rule makes a limit on circuity while the Georgia Commission's rule makes no such limitation. There would seem to be no debate but that the rule of the Interstate Commission, which limits circuity, has more to commend it than the rule of the Georgia Commission, which has no such limitation.

Under the Fourth Section of the Act to Regulate Commerce the Interstate Commission is prohibited from permitting the establishment of any charge to or from the more distant points that is not reasonably compensatory for the service performed.

So, in the last analysis, the Georgia Commission complains of only those things which it has allowed as to these identical commodities and which it is now allowing as to many commodities, and as to the Fourth Section Relief it complains of that which it is allowing in its own order.

Can there be any doubt but that when there is a conflict between the two Commissions over these subjects the superior and controlling power is in the Interstate Commission?

DISCUSSION OF THE GEORGIA COMMISSION'S ARGUMENT THAT "THE COMMISSION'S REPORTS AND ORDERS ARE VOID BECAUSE THEY ARE AN UNLAWFUL INVASION OF THE SOVEREIGN RIGHTS OF THE STATE OF GEORGIA IN REGULATION OF INTRASTATE COMMERCE" (25-36).

Much of this argument is very general, as for instance "the Commission's order definitely and intentionally requires reductions in numerous State rates in Georgia and changes inter-relationship of many purely State rates."

There is no specification as to the rates referred to. It should be borne in mind that the Georgia Commission had no power to make an actual rate. That Commission's General Rule No. 3 (56 Report Georgia Public Service Commission, page 41) contains the following:

> "All of the rates prescribed by the Commission are maximum rates, which shall not be exceeded by any company.
>
> "Any company may charge less than the prescribed maximum rate, provided that, if a less rate be charged to

one person, such company shall, for a like service, charge the same lessened rate to all persons, except as may be hereafter provided; and if any company shall reduce any of its rates to or from one agency or station, it shall, except in cases where otherwise specially provided by the Commission, make a reduction of the same percentage to and from all other stations on its line, to the end that no unjust discrimination may be made in favor of nor against any person, persons, or locality."

Mr. E. M. Price, Rate Expert of the Georgia Public Service Commission, testified as follows (R. 755):

> "Under the Georgia law, all rates prescribed by the Georgia Public Service Commission are maximum rates, and under the rules of the Georgia Commission may be reduced voluntarily by the carriers, provided, of course, in making such reductions discriminations are not created."

Thus a rate ordered by the Georgia Public Service Commission, even though it may be included in tariffs filed with that Commission, may be reduced without authority from the Commission on the only conditions quoted.

The Interstate Commission's order complained of in this case (R. 115) does not undertake to change any rates on these commodities intrastate in Georgia except those which are lower, distance considered, than the interstate rates contemporaneously applicable.

The Interstate order, therefore, does not undertake to change rates which are higher than the interstate rates nor which are on parity with the Interstate Commission's order. We have seen the Georgia Commission can make no minimum rate. It is difficult to understand how it can be claimed, in the light of these undisputed facts, that the Interstate Commission's order reduced rates which were higher than the Interstate schedules or included rates which were on parity therewith.

Under the Georgia Commission's plan the carriers had the right to reduce their rates and in fact to file any rate which they pleased, provided it didn't exceed the Georgia Commission's maximum and did not work discrimination. So that if there have been any changes of the kind complained of in this Section of the Georgia Commission's brief, the changes have been made in pursuance of the latitude allowed by the Georgia statutes, which the carriers had the right to do and there is no complaint from the carriers. The Georgia Commission still has jurisdiction over those rates to the extent that it does not make them lower than the Interstate Commission's rates. It is likewise true of rates which are on parity. However, if there be any error as to this contention on our part, the Interstate Commission, in reply to the contention that there are many instances where the Georgia scale results in the same rates as would the 17517 scale, pointed out as follows (R. 110):

> "That situation only arises where the single-line rates for certain distances are the same under both scales. As stated by the United States Supreme Court in Wisconsin R. R. Comm. vs. C. B. & Q. R. R. Co., 257 U. S. 563-579:
>
> 'Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute.'"

In dealing with the general subject the lower court in its first opinion said (R. 167):

> "Nor do we think an exceptional situation such as is suggested would render uncertain and invalid the entire order. It should rather be amended by a supplemental order covering the particular overlooked instances." (Citing the Wisconsin case.)

DISCUSSION OF CHARTS IN APPENDIX TO GEORGIA COMMISSION'S BRIEF

In the section of the Georgia Commission's brief, beginning at page 27, references are made to rates between certain specific points of origin and destination. Seven charts are attached in Appendix III, pages XVI-XXII. We will discuss those charts as they appear in the Appendix, beginning with page XVI.

CHART A

This illustration involves the transportation of sand and gravel from Montgomery, Alabama, to Geneva, Georgia, a distance of 125 miles, as compared with intrastate transportation from Sparta, Georgia, to Geneva, Georgia. The interstate transportation is over a single line—the Central of Georgia—and the rate is $1.10, the distance 125 miles. The transportation from Sparta to Geneva, the same distance, moves over two lines—the Georgia Railroad and the Central of Georgia—and the rate is $1.25. The difference in the rate depends upon the fact that there is a differential allowed by the Interstate Commission for joint line transportation over single line transportation and no such differential is allowed by the Georgia Commission in its order of March 13, 1928.

The Interstate Commission said (R. 106):

> "It is apparent that certain interstate shippers, due to their location, are now able to ship to certain destinations over single-line routes and by reason of that fact have a rate advantage over other interstate shippers who are compelled to ship over two or more lines to the same point. Several of such instances appear of record. However, no interstate shippers are complaining of that situation. Such advantages are not undue."

There is no suggestion that any sand or gravel would move from either Montgomery or Sparta to Geneva. There are near-

er-by points of production such as Reynolds, Junction City and Columbus, which are intermediate; Columbus being intermediate between Montgomery and Geneva, and Reynolds and Junction City intermediate between Sparta and Geneva. The rates from those points would, of course, be less than the rates from either Montgomery or Sparta.

The Commission stated (R. 108):

> "We had authorized joint-line differentials in these proceedings in consideration of the extra cost incurred by respondents in interchanging traffic from one to the other."

CHART B

This compares the rates from Graysville, Georgia, to Hiram, Georgia, with the rates on the same commodities from Chattanooga, Tennessee, to Hiram. There are three routes from Chattanooga to Hiram. One of them is the single line route over the Southern Railway; the distance is 125 miles; the rate $1.10. The other two are joint line; one of these joint lines being 132 miles and the other 135 miles; the joint line scale is $1.35. If the joint lines charge $1.35 while the single lines charge $1.10, there would be no movement over the joint line routes. The Commission, by its Fourth Section Order, has permitted the joint line route to meet the rate of the single line route and, therefore, the rate is $1.10 from Chattanooga to Rockmart over each of the three lines. Certainly there is nothing unusual or unlawful in that. Graysville is on the N. C. & St. L. road south of Chattanooga and is, therefore, intermediate to Chattanooga and Hiram. Traffic moving from Graysville to Hiram would move on the N. C. & St. L. road to Dalton, a junction with the Southern road, and then proceed to Hiram or to Cartersville, a junction with the Seaboard Air Line, and thence to Hiram. The distance from Graysville to Hiram is 118 miles and the joint line rate applicable to 118 miles results in $1.25, and that is the

rate from Graysville to Hiram. This results, as did Chart A, from the application of the joint line differentials. It is asserted on behalf of the Georgia Commission that the maximum Georgia intrastate rate from Graysville to Hiram is $1.10. This would be the rate if it were based upon the contention of the Georgia Commission that the reduction of the interstate rate from Chattanooga to Hiram, to meet the rate-making route, prevents the Georgia carriers from charging intrastate rates, over the lines forming the joint route, greater than $1.10—the rate from Chattanooga to Hiram. This is thought to have been prohibited by the decision of this court in Louisville & Nashville Railroad vs. Eubanks, 184 U. S. 27. If the $1.10 rate is the normal Georgia Commission scale rate for that distance, then the difference is due to the fact that one system uses the joint line differential and the other does not.

CHART C

The rates involved in this chart are from Birmingham, Alabama, to Atlanta, Georgia. The Seaboard Air Line has a single line from Birmingham to Atlanta, a distance of 166 miles. The rate is $1.30. The Central of Georgia from Birmingham to Opelika and the Western of Alabama and Atlanta & West Point Railroads from Opelika through West Point to Atlanta, make a joint competing line. The joint line route is 232 miles. The joint line route is allowed to make the same rate as the single line route, and the intermediate place—West Point, Georgia—takes $1.35 rate against $1.30 for the longer haul. There would appear to be nothing illegal or indefinite in either of the two phases illustrated by this chart.

CHART D

This concerns rates on the same commodities from Birmingham, Alabama, to LaGrange, Georgia. The rate-making route is the

Atlanta, Birmingham & Coast as the single line and over that line the rate is $1.30. The distance is 166 miles. There is another route between those points via the Central of Georgia from Birmingham to Opelika and thence via the Western of Alabama and Atlanta & West Point. The short distance from Birmingham to LaGrange by the joint line is 161 miles. If the joint line were the rate-making route, the rate would be $1.40, but under the Fourth Section Order, No. 9516, attached to our original brief, the rate of $1.30 over the single line route may be used by the joint line route. It would seem that there would be no difficulty about that and that there would be nothing illegal or unusual, or indefinite in reference to it. It is noted at the bottom of page XIX of this chart that the rate from Birmingham via Opelika to West Point, which is intermediate to Birmingham and LaGrange, is $1.35, while the rate to LaGrange is $1.30. This comes about, of course, through the operation of the Fourth Section Order. There is nothing uncertain, indefinite or wrong about it.

CHART E

This involves the transportation of these commodities from Ellenton, S. C., to Helena, Georgia. The shortest line between these two points is via the C. & W. C., Ellenton to Augusta, Central of Georgia from Augusta to Millen, Georgia & Florida from Millen to Vidalia, and the Seaboard from Vidalia to Helena, making 163 miles at the rate of $1.40. The Commission's maximum scale for this distance is $1.65. There is another route via the C. & W. C. from Ellenton to Fairfax, S. C., and via the Seaboard from Fairfax through Savannah and Vidalia to Helena. The distance is 220 miles. The Commission's maximum rate is $1.50. These carriers are charging $1.40. The first mentioned joint line route is the route of short distance and is, therefore, the rate-making route. The Georgia & Florida,

which is rated as a weak line, might have added an arbitrary, but it did not do so. The rates have been filed; they are lawful and definite; and are satisfactory to the carriers.

CHART F

This involves transportation from Columbus, Georgia, to Helena, Georgia. The single line route is the Seaboard Air Line, 153 miles. The Georgia Commission's order prescribes a maximum of $1.20. The maximum fixed by the Interstate scale is $1.30. There is a joint line route intrastate from Columbus via the Central of Georgia to Macon and via the Southern from Macon to Helena. That route is 176 miles and the Commission's scale for that distance is $1.45, but the joint line scale is, of course, controlled by the lower single line scale, and on the joint line scale the rates to intermediate points are not affected by the competition, and this is the normal result of application of the Fourth Section Order—a condition which is recognized as lawful and proper by Section 8 of the Georgia Commission's order of March 13, 1928 (R. 226).

CHART G

This involves transportation of these commodities from Columbus, Georgia, to Fitzgerald, Georgia. The single line route is the Seaboard Air Line and is 150 miles. The Georgia Commission's maximum rate for that distance is $1.20 and was not charged under the Interstate Commission's order. There is a competing joint line route via the Central of Georgia and the Atlanta, Birmingham & Coast. The scale for the joint line distance is $1.35, but the single line scale controls. Of course, that is again the normal effect of the Fourth Section Order, which is recognized by the Georgia Commission to be lawful and right as above pointed out.

SUMMARIZING THE SEVEN CHARTS:

We find that *Chart A* is a simple application of the joint line differentials.

Chart B is an illustration of the universal fact that intermediate points are not allowed the benefit of Fourth Section orders; that is, the rate from Chattanooga to Hiram is controlled by the single line route, and the joint line routes are allowed to meet that. Graysville is on one of the single line routes and is intermediate to those points of origin and destination and is not allowed to meet it. It is possible that this difference is due to the fact that one system of rates allows joint line differentials and the other does not. In this latter event the sameness of the Georgia Commission's rate and the Chattanooga rate is a coincidence.

Charts C and D are simple illustrations of the joint line route being allowed to meet the rate of the shorter single line route intermediate points or not. They are, therefore, the same thing as Chart B except that Chart B is a little complicated by the circumstances mentioned.

Chart E illustrates the effect of the order when there are two joint line competing routes, in one of which routes a so-called weak line is a party and does not take the arbitrary permitted to it. It has the right to do this when its rates are filed. The reason for its action does not appear. A probable reason is that competition from some other point of origin is involved.

Charts F and G are illustrations of a joint line route meeting the competition of a single line route. There is no difference in rate-making principles between Charts B, C, D, F, and G, and the only difference in Chart E is the use of the weak line, which has been discussed.

These seven charts illustrate three things:

First: The difference between the application of a joint line and a single line rate.

Second: The application of the Fourth Section Order in which less favored routes between competitive points are permitted to meet the competition of the more favored routes within certain limitations, and that the intermediate station does not share in the lower rate.

Third: The meeting of competition between two routes, both of which are joint line, and in one of which routes there is a weak line which does not take its arbitrary.

These charts show that this situation works out to simplicity and exactness, and instead of demonstrating that the Interstate order is faulty, they show that the order is lawful, definite, clear and lends itself to exact statement on principles of rate-making, long established and often applied.

They further show that the bases of the attack on this order of the Interstate Commission are those things which lie especially within the domain of the Commission's jurisdiction.

We are assured by the Record (106) that "after mature consideration," the Commission reached the conclusion that "on this low grade traffic joint line arbitraries should be prescribed."

We have seen that the principles applied by the Interstate Commission are those which are recognized and applied by the Georgia Commission in those circumstances wherein it deems it proper so to do.

DISCUSSION OF SECTION II OF GEORGIA COMMISSION'S BRIEF (pages 37-48)

Appellant asserts that the Commission's reports subordinate the question of rates charged for actual transportation to the

question of adherence to a rate formula. This entire discussion revolves about the use of the joint line differentials and the Fourth Section Order. Our discussion of the charts discusses the points made in this part of the brief.

DISCUSSION OF SECTION III OF GEORGIA COMMISSION'S BRIEF (pages 48-57)

This is based upon the theory that the minimum basis of the rates is vague, indefinite and uncertain. A reading of Section II of the brief and the charts heretofore mentioned shows that the rates are not vague, indefinite or uncertain; that they have been clearly ascertained and filed and are definitely set out in appellant's brief (notably at pages 28-29, 42-43). Complaint is made that the words "contemporaneously applicable" as used in the order are indefinite. The Georgia Commission does not object to the construction placed on the order by the District Court in relation to the meaning of the words "contemporaneously maintained" (see pages 54-5 of the brief). That construction is stated by the Georgia Commission (pages 52-53) to be that these words did not refer to rates that may at any time in the future be applicable. While acquiescing in the court's construction of the words "contemporaneously maintained," issue is taken by the Georgia Commission with the words "contemporaneously applicable" (pages 54-55). In our brief (pages 42-48) we have undertaken to set out our views as to the meaning of these phrases. Acquiescence by the appellants in the court's construction of the phrase "contemporaneously maintained" would appear to us to be acquiescence in the construction of the words "contemporaneously applicable." The rates which are contemporaneously applicable to transportation are those which are of file as required by law, and the rates which are contemporaneously maintained are those which are contained in the same filings or tariff above referred to.

DISCUSSION OF SECTION IV OF GEORGIA COMMISSION'S BRIEF (pages 57-88)

Appellant claims that the Commission's reports and orders are void because there are no findings of undue disparity between the rates charged for intrastate transportation in Georgia and the rates actually in force for interstate transportation.

The first criticism in the Georgia Commission's brief is as to the finding that there is no transportation reason for the maintenance of the basis of intrastate rates on these commodities within Georgia different from that there found reasonable for interstate transportation. We have discussed that finding beginning at page 19 of our brief, also at page 54 (See also R. 506, 627, 682).

The Georgia Commission in its brief (p. 59) states that:

> "The Georgia Commission has never contended, and does not now contend, that the conditions are any different, *in general and on the average*, as between intrastate transportation of commodities and their transportation when crossing State lines into, out of, or across the State of Georgia."

That would seem to be a sufficient admission of similarity of circumstances and conditions and of the finding of the Interstate Commission above quoted.

In addition to this, the Georgia Commission (R. 78-79) in its order undertook "to prescribe such rates as will permit of free movement and competition both interstate and intrastate." Besides, the Georgia Commission did not use the words "in general and on the average." The Georgia Commission's statement was (R. 110) that it "has not claimed, and is not here claiming that there should be a different basis of rates on intrastate commerce in Georgia than on interstate traffic into Georgia and out of Georgia or across Georgia." This would seem to

leave the Georgia Commission no room to complain of the Interstate Commission's findings.

This part of the brief seems to proceed on a complete misunderstanding as to what the Interstate Commission has found. The Georgia Commission in its brief (page 59) contends that some elasticity is necessary in the rate structure and that it is provided "only when maximum scales are prescribed." But elasticity is provided in the maximum and minimum scale provided by the Interstate Commission in its order here involved. This section of the brief really is an argument based upon the theory that the Interstate Commission's method of ascertaining mileage is incorrect—a finding which is based on long experience and the trial of many other methods. Southern Classification Case, 100 I.C.C. 513. The Commission's action on that is necessarily final.

Complaint is also made that distance is the only element mentioned in the findings of the Interstate Commission. We submit that that is quite incorrect. The sources of production and the places of consumption were considered in the State and out of the State, the keenness of competition, the characteristics of the commodities, the competition between the commodities themselves as well as between markets, the low price, the effect upon markets brought about by a relatively small difference in transportation charges, the percentage that this traffic bears to the total tonnage, and the percentage which the total revenue on this tonnage bears to the total revenue on all tonnage were all found by the Commission, the uses to which the commodities are placed and the extensive building of highways now in progress were all considered. Furthermore, this particular schedule of rates was applicable in neighboring States. We also point out that there was an agreement, as we have undertaken to show, as to uniformity of conditions. Besides that the Commission in a painstaking manner pointed out the difference between a great

many of the rates, declaring that they were representative of conditions throughout the State.

The remainder of this part of the brief appears to be a complaint against the Commission's using joint line differentials. Still, at page 74 of the brief, it is said:

> "We agree that it is for the rate-making judgment of the Commission to determine whether rates for a joint-line service are reasonably and fairly to be made higher than rates for other single-line services. But this should be done by definite findings and upon a record of evidence which shows the comparative costs or the conditions of transportation governing the various services."

At page 80 it is claimed that there is a conflict between the order of the Commission and the opinion of the District Court for the Northern District of Georgia in the case of Georgia, Southern & Florida Railway Co. vs. Georgia Public Service Commission, 289 Fed. 878, wherein the court in dealing with intrastate rates in Georgia held that:

> "The fact that one railroad company owns a controlling interest in the stock of another company owning and operating a connecting line does not authorize the application of different rules as to traffic relations between them than those applied to other connecting lines."

It should be noted that the Georgia, Southern & Florida case, above referred to, was decided upon an admission that the Georgia Commission made no effort to examine into the propriety of any joint rates or to examine into the question of the fairness or reasonableness of any joint rates; that they simply undertook to enforce Georgia Freight Rule No. 1, which is set out at page 779 of the reported case, which provides in substance that where two or more connecting lines of railroad are operated by or under one management or company or where the majority stock of any railroad company is owned or controlled,

either directly or indirectly, by a connecting railroad line, the lines of the two roads shall be construed to constitute but one and the same railroad. The court's holding was that this was error in the circumstances of the case. It did not hold that under proper investigation such an order might not be sustained.

We have seen that the Georgia Commission's rates are maximum rates and that the carrier has the right, within certain limitations, to charge rates less than the maximum fixed by the Georgia Commission.

The rate from Stockbridge to Brunswick, referred to in the Georgia Commission's brief, on the Southern Railway, is fixed by the Georgia Commission at the maximum of $1.60. The Southern Railway has the right to file a rate of $1.50, that being less than the maximum allowed by the Georgia Commission, and this right is secured to the carrier by the statutes of Georgia empowering the Georgia Public Service Commission and by its rules on the subject which we have heretofore shown. We, therefore, answer the question propounded in the brief by saying that the reduction by the Southern Railway in its rate to Brunswick was by the voluntary act of the Southern Railway under the authority allowed to it under the circumstances above mentioned. The same rule and reason apply to reduction of joint rates between the Southern Railway and the Georgia, Southern & Florida Railway; the Georgia, Southern & Florida Railway being controlled by the Southern Railway.

The Georgia Commission claims that there was little evidence to support the joint line scale (page 81 of its brief). A part of the evidence was that the Georgia Commission had in its order of 1925 itself directed the differentials in these scales and that the Georgia Commission now requires joint line differentials in many commodities, as we have heretofore pointed out. The Commission states that the interstate rates throughout the ter-

ritory and in Georgia are on joint line differentials and that due to the keenness of competition and the lowness of the rates it was necessary to apply this basis of rates, unless adding thereto the small additional burden that would otherwise have to be added to the single line haul would cause discrimination. There are many comparisons of rates based on joint line and single line. These are given extensively in the evidence of the witness Doss, beginning with his Exhibit 98-B, and there are many exhibits showing not only the theoretical rates but the rates for actual movements. These are shown by railroad witnesses and also by the Rate Expert of the Georgia Commission. We have pointed out herein the very direct evidence of the witness Doss on the subject (R. 346).

DISCUSSION OF THE AUTHORITIES CITED ON PAGES 82 AND 83 OF THE GEORGIA COMMISSION'S BRIEF

These authorities are three cases by the Interstate Commerce Commission. Each one of them recognizes that joint line differentials may be allowed, and often should be allowed, over single line rates. These authorities may be summed up in the statement:

> "The reasonableness of a higher charge for a two-line haul must be determined upon the facts and circumstances, not from the application of that principle alone."

The Interstate Commission evidently considered this question from the standpoint of the facts in particular cases, for it found as follows (R. 106):

> "In the original report in these proceedings we gave careful consideration to the question of whether joint-line arbitraries should be prescribed on this traffic. Various cases were referred to in which we prescribed one scale for both single-line and joint-line application on higher grades

of traffic, but after mature consideration, we there reached the conclusion that on this low grade traffic joint-line arbitraries should be prescribed. It might also be added that most of the interests represented there advocated the prescription of joint-line arbitraries. The fact is we have never prescribed for general application in any territory one scale for both single-line and joint-line hauls of this traffic."

In the original report, the Commission found (R. 35):

"The indication is, however, that the joint-line movement is substantial. The carriers and most of the shipping interests agree that in the transportation of these low-grade commodities, some recognition should be given joint-line service by the prescription of differentials over the scale for single line hauls."

The record at this point shows that the Atlanta Freight Bureau and the Georgia Commission opposed joint line differentials on this traffic. We have heretofore quoted from Mr. Doss' evidence as to the need of these differentials on this traffic (R. 346) and his quotations from the opinions of the Commission in other cases. Mr. Doss' Exhibits Nos. 52-57 exemplify his testimony as to the need of joint line differentials. He shows (R. 349) that the Atlantic Coast Line's earnings on crushed stone, slag and washed gravel under the extension of the Georgia Commission's scale would get down as low as 2.7 mills per ton mile (R. 249). He, on the same page of the record, testified that traffic which pays less than 7 mills per ton mile, especially for distances as short as 200 miles, is not desirable.

It would seem that these findings show distinctly that the Commission did consider this particular case in its own circumstances and surroundings and that these findings show that the Commission fully complied with the requirements of the authorities cited on behalf of the Georgia Public Service Commission.

REPLY TO GEORGIA COMMISSION'S BRIEF (pp. 84-88) UNDER THE HEADING: "SAME CARRIERS MUST SERVE PREFERRED AND PREJUDICED POINTS."

This is an argument, in effect, that a discrimination of the kind here involved can be removed only by orders dealing with rate by rate or line by line. It is based on the theory that the "prejudice" must "flow from a common source." The "common source" here is the Georgia Commission's order of March 13, 1928. The argument appears to be based upon a complete disregard of the utterance in the Wisconsin case (257 U. S. 563, 579) that:

> "Any rule which would require specific proof of discrimination as to each fare or rate and its effect would completely block the remedial purpose of the statute."

The action of the Commission would appear to be in exact accord with the proviso to the first paragraph of Section 4 of the Act. That section is set out in full in the Appendix hereto.

The Georgia Commission is given the power (Ga. Code §2630) "by rules and regulations, to designate and fix the difference in rates of freight and passenger transportation to be allowed for longer and shorter distances on the same or different railroads, and to ascertain what shall be the limits of longer and shorter distances." It used this power in its order of March 13, 1928, which is the subject of this litigation. See R. 82 (8) and 81 (5).

ANSWER TO SECTION V OF GEORGIA COMMISSION'S BRIEF (pp. 89-96)

The Georgia Commission claims that there was no substantial evidence of record to sustain a conclusion of unlawful disparity between intrastate and interstate rates.

This contention is reduced to two points (its brief p. 90):

The first of these is, in substance, that there is an absence of showing that individual rates for individual movements in Georgia ought to be the same as the rates charged for individual interstate movement into Georgia, etc.

We refer to our original brief at pages 19-26; 54, 55-58.

Doss' Exhibit 98-B (R. 621) contains many comparisons of individual rates, single line and joint, prescribed by the Georgia Commission in its order of April 1, 1925, and those prescribed by the Interstate Commission in Docket No. 17517, and those prescribed by the Georgia Commission in its order of March 13, 1928. His Exhibit No. 99-B (R. 621) makes further comparisons of these rates. This exhibit deals with "Trunk Lines." These exhibits show the differences between the two scales. His Exhibit No. 100-B "shows the rates on these commodities to 46 Georgia points widely scattered throughout the State and fairly represents the whole situation" (R. 623). At this last reference this exhibit is explained.

See also Exhibit 101-B (R. 625) showing the location of the destinations referred to in Exhibit 100-B, and Exhibit No. 102-B (R. 625) comparing rates and distances on crushed stone from interstate points and from intrastate points.

The witness Crane gave like evidence as to Southern Railway territory (R. 338) and introduced Exhibits Nos. 128 to 156, inclusive. These are of much the same kind as those referred to as having been introduced by the witness Doss.

The witness Boulineau (R. 683) gave the same evidence as to the difference worked by the Georgia scale as compared with the interstate scale from May to August, 1928. That difference was $9,948.63 (R. 684).

The witness Maurer (R. 674) gave detailed evidence as to tonnage in these commodities carried by the Seaboard Air Line Railway in 1926 and 1927, and the location of their producing points in Georgia, Alabama and South Carolina. His Exhibits 143-B (R. 675) and 144-B through 152-B make many comparisons of rates between interstate and intrastate systems as applied to actual transportation over that line, with statements of the revenue under one system as compared with the other.

The witness Burke (R. 681), for the Nashville, Chattanooga and St. Louis Railway, introduced a map of that road, Exhibit 153-B, and showed the principal producing points for these commodities. His Exhibit 155-B showed the rates from Chattanooga, Tennessee, to the principal common and junction points in Georgia contrasted with the scale of the Georgia Commission prescribed by its order of March 13, 1928. His Exhibit No. 156-B showed rates from Cumberland, Alabama, and Chattanooga, Tennessee, to points in Georgia, to which there had been actual shipments of these commodities, together with a comparison of the rates (R. 682).

The witness Youmans gave evidence (R. 638) as to the unfortunate effect of the unequal Georgia rates on the operations of the Ellenton Gravel Company, which operates at Ellenton, South Carolina, on the Charleston & Western Carolina Railroad. The Georgia rates completely eliminated the company from Georgia business, although it had done a large business there, especially in the Coastal regions (R. 639). He used Exhibit 100-B and showed many specific instances of discrimination. This plant is "just over the river out of Georgia" (R. 640), twenty-two miles from Augusta and eighteen miles from the State line. He testified that with rates on the same mileage basis his company could do business in Savannah, Brunswick, Waycross, and that section. He testified that on a number of jobs he had found that he could not bid because of the freight rates (R. 641).

The same kind of evidence was given by Richard Simmons as to the Weston and Brooker Company in South Carolina, 80 miles from the Georgia line (R. 643-4).

H. S. Angle testified (R. 646) for the Dixie Sand & Gravel Company of Chattanooga. He said: "In short, our contention is that there is no justification for different scales on sand, gravel, and crushed stone on interstate traffic than apply on intrastate traffic for hauls of the same length" (R. 647).

The witness Todd, doing business in these commodities at Steel Creek, South Carolina, 30 miles east of Augusta, on the C. & W. C. Railroad, testified to the ill effects of the Georgia rates on his business in Georgia; that he had lost business on which he was working at the time the Georgia rates went into effect. He thinks the rates should be on the same mileage basis (R. 693-4).

E. M. Price, rate expert of the Georgia Commission, gave extensive testimony in this case, beginning at Record 730. He offered many exhibits, 160-B through 180-B. These show the railroads doing business in Georgia and many of the producing points. He testified to the competition between Georgia producers and producers in other states, and to the relative railroad facilities of those producers (R. 732-33).

In a statement by counsel for the Georgia Commission it is stated (R. 733):

> "Among other things there is a statement alluded to by Mr. Price in his comments on this exhibit, that to prescribe within the state of Georgia a joint line scale higher than a single line scale would produce unjust discrimination against Georgia producers and in favor of other Georgia producers."

Thus showing that the joint line differentials were undoubtedly in issue; the Interstate Commission contending for their neces-

sity and the Georgia Commission contending against the propriety of their use.

The exhibits of the Georgia Commission are extensive and put before the Interstate Commission the full strength of the case.

The Interstate Commission thus had before it full evidence as to the contentions of both sides and proof of the effect of the application of the two scales of rates operating at the same time in the same territory.

> "A difference of a few cents in transportation charges frequently affects to a substantial degree the decision of attempting to participate in a given construction enterprise. We watch variations in transportation charges pretty closely and also determine in advance whether we can compete on a given project" (Whiggam—R. 631).

The Commission's findings, in much detail, show that all of this evidence was considered. The ground of objection is apparently based on the use of the Fourth Section Order and the method of ascertaining the mileage. Neither appears to be meritorious. The second ground is based upon the allegation that there is no evidence that transportation service over joint line routes is more expensive than over single line routes. This, as we have shown, is not borne out by an inspection of the record.

REPLY TO SECTION VI OF GEORGIA COMMISSION'S BRIEF (pp. 96-102)

The Georgia Commission argues that there were no evidence or findings that the intrastate rates were an undue burden upon interstate revenues of the carriers or that the alteration thereof would produce additional revenues. At pages 26-30 and 60-63 of our original brief the findings of the Interstate Commission on this subject are set out. The exceedingly low ton mile charge

on these commodities under the Georgia Commission's scale was there shown and the Commission's findings are also shown. The Commission found that this traffic made 22.7 per cent. of the Atlantic Coast Line's traffic during one of the years investigated. The revenue was in much lower ratio. The unit of revenue, the ton-mile charge, is extremely low. The amount of the gross revenue is shown as to several of the roads and estimates made of the increase, had the scale of rates made by the Interstate Commission been in effect. These are pointed out in our original brief at the pages noted. The purpose of this scale was to provide uniform rates in the Southern territory. This has been accomplished in Alabama, South Carolina, Tennessee and Kentucky, except in the western parts of the two last named States. If these rates be increased and made uniform in so large an area, the result must of necessity be increased revenues to the carriers from both interstate and intrastate hauls.

The Georgia Commission's brief shows, as we have pointed out, the existence of "cut-throat" competition. It was necessary to remove this and to do it by rates which would not prefer intrastate traffic over interstate, nor interstate traffic over intrastate. The Interstate Commission has undertaken to do this by system of uniform rates. There must of necessity be increased revenues to the carriers from both interstate and intrastate traffic in these commodities. The record amply shows that the State rate was less, and materially less, than the interstate rate actually charged. The interstate rates were of file and could not be increased or decreased by the independent action of the carrier. The filed rates were the ones actually charged. The State rate charged might have been less than the filed rate, as we have seen.

The Interstate Commission found that there was unlawful discrimination worked against interstate commerce by the Georgia intrastate rates and the extent thereof and made provision for

the removal thereof. This finding was based upon unlawful discrimination against persons, places and traffic and as well against interstate commerce. Both findings are supported by the evidence and by the decree of the lower court.

ANSWER TO APPENDIX II (page X) OF GEORGIA COMMISSION'S BRIEF

The first illustration used in this Appendix is as to transportation from Anniston, Alabama, to Atlanta, Georgia. There are two lines. The long line is 115 miles, made up of the lines of the Louisville and Nashville Railroad and the Seaboard Air Line Railway. The joint line scale is $1.25. This illustration does not show that the short line is the Southern Railway, which is a single line and 104 miles. Its rate is $1.10. The Interstate Commission's order permits the joint line route to meet the rate-making route under the terms of the Fourth Section Order. This illustration is misleading because it leaves off the statement that there is a short line, which is necessary to show the application of the Fourth Section Order. Under similar circumstances the same condition would apply intrastate in Georgia; the carriers being permitted by both the Georgia scale and the Interstate scale to meet the competition of the rate-making route.

The illustration on page XI from Elberton, Georgia, on the Seaboard, to Round Oak, Georgia, a joint line distance of 112 miles, is incomplete for it does not show whether it is or is not a competing line which makes a different rate.

The illustration as to the Georgia, Southern & Florida Railway and the Southern Railway System has been hereinbefore dealt with.

The reference to short and weak lines on page XII is answered by the statement that the arbitraries to these lines, allowed

under the Interstate system and as well under the State system, are optional. They become fixed under the Interstate rates when they are filed, and under the Georgia tariffs they become maximum rates when they are filed. If they are lowered in the use, the lower rate under the Georgia system by that fact then becomes the maximum rate.

The reference on page XIII to the transportation from Stockbridge, Georgia, to Brunswick, Georgia, over the Southern Railway has been heretofore answered.

The illustration on the same page as to transportation from Montgomery, Alabama, to Camilla, Georgia, shows a competition between a single line route, which is 244 miles over the Atlantic Coast Line, and a joint line route, which is less. The principles often stated control that and require the reduction of the rate over the single line to meet the rate over the joint line route which is lower.

Appellant cites the case of United States vs. Missouri Pacific R. R. Co., 278 U. S. 269 (Subiaco Case), to sustain this contention as to these matters last mentioned. It is difficult to understand how that case is applicable to any of the instances cited. That case construed Section 15 (3), (4) of the Interstate Commerce Act, holding that the Interstate Commission could not require a railroad to participate in proposed through routes where a part of the carrier's railroad to be included is slight in length as compared with other parts over which it enjoys long hauls under existing routes between termini the same as those proposed.

No such order is made here; there is no complaint by the carriers as to there being short hauls; the order here is a permission to the carrier with the unfavored line to meet the competition (within limits) afforded by the carrier having the favored or rate-making line.

REPLY TO BRIEF ON BEHALF OF THE STATE HIGHWAY BOARD, AND OTHERS

The first thought in reference to this brief is that there should have been no appeal. As we have pointed out in our original brief (page 7), the bill filed by the State Highway Board, and others, was consolidated into the case of Georgia Public Service Commission, et al, vs. United States of America, et al, in Equity No. 563, and the litigation has proceeded as one case under the title of the last named bill (R. 159-60). There was but one case and there should have been but one appeal.

DISCUSSION OF THE STATEMENT OF "THE ISSUES PRESENTED" (page 4)

There are seven issues stated. The first is that there was neither evidence nor definite findings justifying the regulation of all intrastate rates. We have discussed these questions at length. There was certainly sufficient evidence and certainly the findings were definite and the tariffs filed show definite application. We presume that the indefinite claim is based upon the Fourth Section Order and the method of ascertaining mileage. The Georgia Commission's order provides for Fourth Section relief, as we have pointed out, and it also provides the same kind of method for ascertaining mileage as that used by the Interstate Commission.

The second point is that the order attempts to regulate intrastate rates based on future action of the railroads. This is evidently based upon the use of the words "contemporaneously applicable" in the order, and we have discussed that.

The third point is that the order prescribes joint line differentials which create discrimination against intrastate shippers. The Georgia Commission has itself prescribed joint line differentials for the same traffic in its order of February 25, 1925,

and now prescribes joint line differentials as to traffic in a good many other articles. The Interstate Commission has determined that those differentials are necessary to avoid discrimination, and certainly that finding was on sufficient evidence.

The fourth point is that the order purporting to bring intrastate rates into harmony with interstate rates conflicts with the limitations put on the Federal Commission by the Constitution, the Interstate Commerce Act and the decisions of this Court. This is evidently based on a misinterpretation of the word "harmony." The Interstate Commission found that the State rates unjustly and unlawfully discriminated against persons and places and traffic, etc., and against interstate commerce, and prescribed its system of rates to remove this discrimination. The State Commission claims that its system is necessary to remove discrimination and the Interstate Commission claims that its system is necessary. Of course, the Interstate Commission's determination on that fact overrides the State Commission.

The fifth point is that the order cannot be sustained under Sections 3 or 13 of the Interstate Commerce Act. This is probably also based on a misconstruction of the word "harmonize." The Commission understood that the absence of harmony between the two systems was so great as to make discrimination prohibited by Sections 3 and 13.

The sixth point is that there was no adequate and fair hearing. This is based on the theory that the case was not so reopened to redetermine whether or not the Interstate rates fixed by the Commission's order of January 21, 1927, were reasonable. We have discussed that.

The seventh point is that all the reasons combined show arbitrary action on the part of the Interstate Commerce Commission. That is apparently thrown in for good measure.

FIRST POINT

We have heretofore pointed out that the Interstate Commission's findings and order (R. 110-113) undertook to change only those intrastate rates which were lower, distance considered, than the interstate rates contemporaneously applicable, and the discrimination which was found was to the extent that the intrastate rates were lower. We have shown the statewide investigation made by the Commission, including points of origin within Georgia and without Georgia of these commodities, their nature, the keenness of competition, and the points of destination which were considered. The record abounds in carefully collated facts made up not only of large amounts of exhibits comparing rates but also of testimony of shippers out of the State showing that the Georgia rates had entirely eliminated them from the Georgia market. The brief seems to take no notice of the fact that there was an agreement in this case at the first hearing that the conditions throughout the territory were such as to warrant a uniform rate level on these commodities, nor does it give effect to the evidence showing the volume of the traffic, the gross revenues therefrom, the difference which would have been produced in the way of revenues if the interstate scale had been used. The Commission found the characteristics of the commodities and the uses to which they were being placed, and that these rates were already in effect in other states in the general territory. The rates were made for the purpose of moving the traffic. The findings of the Commission as to the difference in revenue which would have accrued to several of the carriers mentioned under the interstate rates over that which accrued to them under the intrastate rates must be taken in connection with these facts and with the findings that the Georgia rates produced discrimination against interstate commerce.

The Interstate Commission had found what were the reasonable rates and fixed those in its order of January 21, 1927. It

then found uniformity of conditions and that there was no reason why there should be a difference in the transportation charges on these commodities in Georgia simply because they moved interstate or intrastate.

The brief stresses the fact that the Interstate Commission expected the State of Georgia to bring its rates "into harmony" with the Interstate system. This overlooks the context in which those words are used. The order reopening the case is at R. 86-87. It is there shown that the case was reopened for the sole question of determining whether or not the Georgia rates on these commodities in relation to the interstate rates and minimum weights cause, or will cause, "any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce, on the one hand, and interstate commerce or foreign commerce, on the other, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce." Appellant refers to the use of the words "in harmony with" on page 92 and also on page 93 of the record, but a further reading of the text at page 93 shows the use of the same language as that last above quoted from page 87. So it would seem quite clear that the Interstate Commission has not treated the words "in harmony with" to have a meaning outside of its jurisdiction under Sections 3 and 13 of the Act.

SECOND POINT

The second point of the Highway Board's brief is that "The order assailed attempts to regulate intrastate rates based on future action of the railroads."

We discuss that at page 42 of our original brief and also at page 38 of this brief.

The Highway Board's brief differs substantially in its position from that taken by the Georgia Commission on this subject.

The Georgia Commission (pages 54-55 of its brief) has no objection to the construction placed by the District Court on the words "contemporaneously maintained." The Highway Board in its brief does take issue with those words rather than with the words "contemporaneously applicable." Both of them proceed upon the theory that if it be possible to so construe an order that it will produce an illegal result, that construction should be had. The rule as pointed out in the court below is, of course, to the contrary.

At page 14 of the Highway brief, reference is made to the fact that the carriers in many instances were publishing lower rates interstate than the maximum rates prescribed by the Commission in 17517. That was, of course, before the issuance of the order of December 9, 1929. We have pointed out in our original brief (page 52) the Interstate Commission's reply to that statement, which was in effect that such instances of such departures as existed were the result of error which would be corrected. There is no evidence of a departure from the Commission's interstate scale of rates by the carriers since that time. The Commission, in referring to this complaint as to the alleged failure of the filed rates to meet the ordered ones, said (R. 108):

> "An examination of this data discloses that with few exceptions the instances given are simply where different routes are, under the authorized fourth-section relief above referred to, meeting at competitive points the rates set by the rate-making route."

THIRD POINT

This point of the Highway Board's brief is that "the order prescribes joint line differentials which create discriminations against intrastate shippers."

Instances of discrimination against intrastate shippers are not pointed out. We have in both our original brief and in this reply brief treated with the question of joint line differentials. It is worth while noting that the Highway Board's brief, in quoting from the evidence of Rate Expert Price of the Georgia Commission, shows that that Commission did create joint line differentials on brick in one of its proceedings. The Interstate Commission had fixed joint line differentials on brick and the Georgia Commission adopted it. The evidence also shows that the Georgia Commission in its order of 1925, on the commodities here involved, did fix joint line differentials on brick. We have shown that joint line differentials have been fixed by the Georgia Commission on a good many commodities. There is no more reason for saying that the joint line differentials or that the long and short haul provisions make discrimination in this instance than in any other instance in which they are or may be used. Discrimination is, of course, a question of fact and all the evidence referred to or quoted in the Highway Board's brief and in the Georgia Commission's brief was before the Interstate Commission, and we are assured by the Commission, as we have heretofore pointed out, that careful consideration was given to the subject of joint line differentials and they found it necessary to apply this rule in this case to avoid this contention. It may be that, as is shown in the Highway Board's brief, there has been a tendency to prescribe rates without joint line differentials, but it would be futile for the Georgia Commission to argue that joint line differentials are never used when it has itself applied them to these identical commodities and is now applying them to many other commodities. Manifestly the use of these differentials is a matter of determination by the respective Commissions acting within their respective

jurisdictions. When that action is had under sufficient evidence, it is final.

The argument which undertakes to show that the Interstate Commission's rates caused discrimination between intrastate shippers loses its value because of its indefiniteness and because it does not take into consideration the fact that the Georgia rate system leaves the carriers substantial freedom in that the Georgia rates are only maximum rates and also because, as was pointed out in the court below, the Georgia Commission itself has substantial control over many of these rates, which control might very well be used to relieve any improper disparity between rates. Furthermore, the Interstate Commission has the right to remove those disparities which are unjust and unreasonable, and under the authority pointed out in the Wisconsin case, in the 257th U. S., 579, which is referred to in the Commission's report (R. 110), the Commission has the right to exercise and will exercise the power to remove such discrimination.

Viewing this argument on the part of the Highway Board in its context, we think that it means that joint line differentials should not have been allowed and that the Fourth Section Order should not have been issued.

The Commission does not require the "maintenance over all routes between two given points of the rate established via the rate-making route" (R. 109). The Commission there states that the argument to that effect "is without merit."

FOURTH POINT

This point of the Highway Board's brief is that "the order under attack is predicated upon an assumed power to 'harmonize' State and Interstate rates."

We have hereinbefore referred to this. This is a continued attempt to use the word "harmony" or "harmonize" to mean equality. The Commission's findings and orders show that the Interstate Commission undertook to use harmony or want of harmony to express the absence or presence of unlawful discrimination. The Commission recognized that bare difference between interstate and intrastate rates is not unlawful per se, but that the thing which is unlawful and which the Commission has the power to remove is an unjust and undue discrimination, preference or prejudice against persons and localities, or discrimination against interstate commerce worked by intrastate rates. The proceedings were reopened to ascertain whether or not the Georgia rates on these commodities cause or will cause any undue or unreasonable advantage, preference or prejudice or any undue, unreasonable, or unjust discrimination against interstate rates (R. 87).

FIFTH POINT

This point of the Highway Board's brief is that "the order cannot be sustained under Sections 3 or 13 of the Interstate Commerce Act."

The first point under this heading is as to the use by the Interstate Commission of the word "harmonize." We have answered that.

The next statement is that such order will include many rates not within the proper class or reason of the order. No rates are pointed out and the Interstate Commission's order undertook to alter only those Georgia rates which were lower than the Interstate rates.

The next point is that the method of ascertaining mileage of

the Georgia Commission is different from that of the Interstate Commission. We think if that were correct the conclusion drawn therefrom would not follow. The statement is not correct. We have discussed the Georgia Commission's method of ascertaining mileage in such circumstances.

The next point is based upon the difference in gradations between the two scales of rates. The lower court found in the second hearing that this point had been abandoned, as we have heretofore pointed out, but whether abandoned or not the Interstate Commission's gradation was made with full knowledge of the State's scale and its gradation, and the Interstate Commission determined that the scale which it fixed with its gradation was necessary to remove the unlawful discrimination worked by the Georgia scale. This seems to be simply a detail of rate-making, clearly within the domain of the superior rate-making authority.

SIXTH POINT

This point is that "there was no adequate and fair hearing."

This has been discussed in our original brief (pages 34 and 41) and in this brief. There is little to be added. The record in the original hearing in this docket number before the Commission was relevant in the second hearing in the same proceeding to show the reasonableness of the rates prescribed by the Interstate Commission in its first order of January 21, 1927. The parties in the second hearing included those in the first and those who came into the case in the nature of intervenors.

The objection pointed out in the Highway Board's brief (page 31) is first to the effect that the Commission had no jurisdiction

under Section 13 and that "the petition in that case cannot be filed as a supplemental petition because it is based on facts arising after the hearing of the original case, and for other reasons specifically set forth in my answer heretofore filed in this case." The usual office of Supplemental pleadings is to set up matters happening after the filing of the original pleadings.

The Commission (R. 59) in effect left the case open at the time of making the first report, for it said: " * * * because it is felt that the Georgia Commission will cooperate in authorizing such revisions as may be necessary to bring their rates into harmony with the interstate adjustment herein approved." The Georgia Commission didn't do that and the case was reopened.

The next objection (page 32) is in effect to the consideration of the record in the first hearing. There is no assignment of any cause of objection, but just a general assignment equivalent to "I object." Such an objection is of no value whatever. Furthermore, it is clearly manifest that the record was usable for a good many purposes and certainly to show that the rates prescribed in the first order were reasonable. Those rates were in effect at the time of the second hearing and there was a presumption of reasonableness attached to them.

The next objection (page 32) is to the record, and Mr. Watkins there states "the clients of mine not having been in the former case, and this being to them entirely new."

The Georgia State Highway Commission, Fulton and DeKalb Counties, Georgia, City of Atlanta, Georgia, Atlanta Freight Bureau, Morac Sand Company of Junction City, Brown Brothers of Junction City, and certain other Georgia Sand and Gravel Dealers for whom appearance was entered by Mr. Watkins

(R. 614) came into the second hearing as though they were intervenors and, therefore, took the case as they found it.

We respectfully submit that the decree of the lower Court should be affirmed.

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APPENDIX

SECTION 4 OF THE INTERSTATE COMMERCE ACT:

SEC. 4. (*As amended June* 18, 1910, *and February* 28, 1920.) (1) That it shall be unlawful for any common carrier subject to the provisions of this Act to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this Act, but this shall not be construed as authorizing any common carrier within the terms of this Act to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission such common carrier may in special cases, after investigation, be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property; and the Commission may from time to time prescribe the extent to which such designated common carrier may be relieved from the operation of this section; but in exercising the authority conferred upon it in this proviso the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and if a circuitous rail line or route is, because of such circuity, granted authority to meet the charges of a more direct line or route to or from competitive points and to maintain higher charges to or from intermediate points on its line, the authority shall not include intermediate points as to which the haul of the petitioning line or route is not longer than that of the direct line or route between the competitive points; and no such authorization shall be granted on account of merely poten-

tial water competition not actually in existence: *And provided further*, That rates, fares, or charges existing at the time of the passage of this amendatory Act by virtue of orders of the Commission or as to which application has theretofore been filed with the Commission and not yet acted upon, shall not be required to be changed by reason of the provisions of this section until the further order of or a determination by the Commission.

(2) Wherever a carrier by railroad shall in competition with a water route or routes reduce the rates on the carriage of any species of freight to or from competitive points it shall not be permitted to increase such rates unless after hearing by the Commission it shall be found that such proposed increase rests upon changed conditions other than the elimination of water competition.